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Ariel Shapiro

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EXAMINER

LEFF, STEVEN N

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/812,743	SHAPIRO, ARIEL	
	Examiner	Art Unit	
	STEVEN LEFF	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 August 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 and 17-28 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 and 17-28 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>6/13/08</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

- Claims 1-12, and 17-28 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-16 of U.S. Patent No. 6740346 in view of Esty (RE 28892). Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 1 of patent ‘346 fully encompasses all of the limitations with respect to claim 1-11 of application 10/812743 except for the limitation with respect to providing atmosphere treatment, that the sealing element is separate from the box and the bag, and that the sealing element is specifically a cap for sealing the aperture from outside of the box. However since claim 1 of the ‘346 patent teaches a sealable atmosphere aperture which is in communication with the interior of the bag, and since claim 2 teaches that the bag is gas impervious it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to teach

providing atmosphere treatment in view of Esty (RE 28892) for its art recognized and applicant's intended purpose of providing a specific atmosphere in order to provide an extended shelf life of the fresh produce as is taught by Esty (RE 28892).

It would have further been obvious to teach that the sealing element is separate from the box and the bag, and that the sealing element is specifically a cap for sealing the aperture from outside of the box since claim 1 of patent '346 teaches a sealing element, and since claims 14 and 16 of the '346 patent specifically teaches a sealing element, where the sealing element is specifically a plug for sealing the aperture from outside of the box. Thus it would have been obvious to one of ordinary skill in the art in order to provide a carton which prevents the treating gas from escaping the bag through the treating aperture after treatment and further which is capable of being re-sealed thus providing a carton which can readily accept different gas environments through the same aperture at different times.

In addition it is noted that present claims 1-13 and 16 are drawn to a method for packaging produce while patent claims 17-29 are drawn to a package of produce. However given that the method claims are drawn to a method of packaging produce where the bag in the package is filled with produce, it would have been obvious to one of ordinary skill the art to seal the produce in the bag, provide the atmosphere treatment, and then seal the bag as presently claimed thus providing a system for packaging produce.

Regarding the phrase "operative to seal said bag to said box", Esty teaches a sealing layer on the outside of the carton which is attached to the wall of the container. Esty further teaches "aperturing" the bag and sealing layer in a single operation. Regarding the word "seal", the specification does not clearly define what is meant to represent the word seal and further states "to seal the inside of the carton from the outside environment." In the instant situation reference is given to a common dictionary meaning for the word "seal" where the definition reads "anything that tightly or completely closes or secures a thing" (Dictionary.com). Thus regarding claims 1 and 17, Esty teaches a tube or tubes which are hermetically sealed to the flexible bag where the tube or tubes extend from the bag and are "alignable with and extend through the inlet and outlet openings, and are supported by the walls forming the openings of the container" (col. 2 line 8+). Thus where the sealing element is taken to be tube and where the tube may be sealed after treatment of interior of the bag by cutting the end of the tube

with a hot scissor thus melting the open ends together, it is the Office's view that the wall of the container comprises openings which are formed to "completely close or secures a thing" or secure the tube(s) to the container wall of the carton as the tubes extend there through, since the container walls provide enough support that the tubes are grasped by the walls of the container ensuring that the tube(s) maintain extended though the openings until physically removed.

With respect to claims 2, and 18 although Esty does not teach that the atmosphere treatment comprises vacuum cooling, Esty does teach that the gas treatment could be performed by evacuating the air by applying a vacuum. Esty continues by reciting that the tube can be connected to a hose, which is connected to a supply of inert gas. (col. 2 line 41+) In the instance where the tube is connected to a source which may supply cool air, Esty would thus be able to apply vacuum cooling to the container. Therefore it would have been obvious to one of ordinary skill in the art to change the source of the atmosphere treatment used to supply the inert gas to the package as taught by Esty, with a source that supplies cool air instead, thus allowing the contents of the treatment package to undergo different treatments, within the same bag, by simply changing the supply source.

With respect to claims 3, 7, 19, and 23, although Esty does not specifically recite the word "fumigation", Esty does teach that the lack of oxygen will cause any animal life included in the container to quickly suffocate and the produce will be protected from insect damage." (col. 3 line 14+) Esty further teaches the use of Nitrogen gas for its art recognized and applicants intended function of purging the bag of oxygen, thus eliminating insects within the bag containing the produce. In support of this position, an article by Stuart M. Bennett, on the website <http://www.the-piedpiper.co.uk/th7.htm> recites "fumigation is the use of a gas (not the spraying of insecticides) to destroy pests which may infest a building or a product," where "virtually anything can be fumigated." (pg. 1 col. 3) Bennett continues by teaching that various gases may be used to fumigate a product or environment, and specifically names Nitrogen. (pg. 2) It is noted that MPEP 2144.04 states that "In considering the disclosure of a reference, it is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom." (Thus the article by Bennett is not cited to modify the first reference but to merely provide support for the

inherent teachings of Esty.) Therefore, Esty inherently teaches all of the limitations of claims 3, 7, 19, and 23, absent any clear and convincing evidence and/or arguments to the contrary.

Therefore it would have been obvious to one of ordinary skill in the art to change the supply source from a first treatment atmosphere to a second atmosphere thus not only allowing the contents of a package to be treated different ways, but would also allow the use of the container for treating different contents with different atmospheres depending upon the different characteristics of the given food type. The claimed method of packaging agricultural produce differs from Esty only in that the atmosphere treatment applied in Esty uses inert gasses where the atmosphere treatment of the claims is drawn to a cool atmosphere.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
- Claims 1-12, and 17-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Esty (Re 28892) in view of Wu et al. (5575418) as evidenced by Bennett <http://www.the-piedpiper.co.uk/th7.htm>.

Esty teaches a package for preserving perishable products, such as "fruits, vegetable, etc."(col. 2 line 4+). Specifically Esty teaches a communication aperture in

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the wall of a container (col. 2 line 8+) or box (col. 2 line 8+) that contains a "flexible impermeable bag" (col. 2 line 1+) which contains perishable products, at least one sealable localized atmosphere communication aperture formed in a wall of the box (col. 2 lines 7-8) and communicating with the interior of the bag (col. 2 lines 5-10) and a sealing element located in the at least one sealable localized atmosphere communications aperture (col. 2 lines 7-8), which is further operative to seal said bag to the box (col. 2 lines 1-10). It is noted that the sealing element is taken to be the plastic tubes.

Esty continues by teaching providing at least one bag aperture in the at least one bag in general registration with the sealable aperture (col. 2 line 1-10) where the produce is sealed inside the bag within the box while leaving the one bag aperture and the sealable communication aperture open (col. 2 lines 32-37) and the plastic tube is connected to a hose for providing atmosphere treatment within the bag (col. 2 line 42+), where sealing of the container after the atmospheric treatment is affected "by cutting of the plastic tube(s) with hot scissors" (col. 2 line 67+).

Regarding claims 1, and 17 and the phrase "operative to seal said bag to said box", and "separate from said box and said bag", Esty teaches a sealing layer on the outside of the carton which is attached to the wall of the container. Esty further teaches "aperturing" the bag and sealing layer in a single operation. Regarding the word "seal", the specification does not clearly define what is meant to represent the word seal and further states "to seal the inside of the carton from the outside environment." In the instant situation reference is given to a common dictionary meaning for the word "seal" where the definition reads "anything that tightly or completely closes or secures a thing" (Dictionary.com). Thus regarding claims 1 and 17, Esty teaches a tube or tubes which are hermetically sealed to the flexible bag where the tube or tubes extend from the bag and are "alignable with and extend through the inlet and outlet openings, and are supported by the walls forming the openings of the container" (col. 2 line 8+). Thus where the sealing element is taken to be tube and where the tube may be sealed after treatment of interior of the bag by cutting the end of the tube with a hot scissor thus melting the open ends together, it is the Office's view that the wall of the container comprises openings which are formed to "completely close or secures a thing" or secure the tube(s) to the container wall of the carton as the tubes extend there through, since the container walls provide enough support that the tubes are grasped by the walls of the

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container ensuring that the tube(s) maintain extended through the openings until physically removed.

With respect to the "sealing element, separate from said box and said bag, located in said at least one sealable localized atmosphere communication aperture, operative to seal said bag to said box", it is noted that Esty is taken to teach this limitation in the instance that the tubes are taken to be the sealing element, and therefore Esty is taken to teach a sealing element, separate from said box and said bag, since the tubes are separate entities with respect to the bag prior to sealing and the box prior to attaching and as is depicted by applicant's figure 4b element #72. Further in the instance that the phrase is taken with respect to specifically excluding the bag and the box as the sealing element, Esty positively teaches such in the instance that the sealing element is not the box or the bag, where the tubes are located in said at least one sealable localized atmosphere communication aperture, and are operative to seal said bag to said box.

Regarding claims 8, 11, 12, 24, 27, and 28 Esty teaches a sealing layer on the outside of the carton which is attached to the wall of the container. Esty further teaches "aperturing" the bag and sealing layer in a single operation. Regarding the word "attaching" in claim 11, 12, 27, and 28, and the word "attached" in claims 8 and 24, the specification does not clearly define (on page 8 lines 1+) what is meant to represent the word attached and further states "any equivalent adherence of the bag to the carton in the region of aperture 16." In the instant situation reference is given to a common dictionary meaning for the word "attached" or "attaching", where the definition reads "to fasten, secure, or join" (Dictionary.com). Thus regarding claims 8, 11, 12, 24, 27, and 28, Esty teaches a tube or tubes which are hermetically sealed to the flexible bag where the tube or tubes extend from the bag and are "alignable with and extend through the inlet and outlet openings, and are supported by the walls forming the openings of the container" (col. 2 line 8+). The tube may be sealed after treatment of the interior of the bag by cutting the end of the tube with a hot scissor thus melting the open ends together, thus it is the Office's view that the "sealing layer" is the seal created by cutting the end of the tube with the hot scissors thus fusing the ends together. Although this step is taught by Esty after treating the produce a first time, it is the Office's view that treatment may take place through the same tube multiple times by simply cutting the tube with non-heated scissors

or by inserting a sharpened tool directly through the seal thus creating an opening, followed by re-cutting the tube with hot scissors thus re-producing a seal.

Therefore, it is interpreted that with respect to the sealing layer being adhered to the wall of the container that Esty positively teaches this limitation when taking the word "attach" for its' literal and broadest reasonable dictionary definition since Esty teaches that the wall of the container comprises openings which are formed to "support" or attach the tube(s) to the container wall of the carton as the tubes extend there through, in order to provide enough support that the tubes are grasped by the walls of the container ensuring that the tube(s) maintain extended though the openings until physically removed."

Esty further teaches purging the container for a time sufficient to purge essentially all of the oxygen from the container, (col. 3 line 9+) and substituting an inert gas (col. 2 line 41+) within the treatment atmosphere.

With respect to claims 3, 7, 19, and 23, although Esty does not specifically recite the word "fumigation", Esty does teach that the lack of oxygen will cause any animal life included in the container to quickly suffocate and the produce will be protected from insect damage." (col. 3 line 14+) Esty further teaches the use of Nitrogen gas for its art recognized and applicants intended function of purging the bag of oxygen, thus eliminating insects within the bag containing the produce. In support of this position, an article by Stuart M. Bennett, on the website <http://www.the-piedpiper.co.uk/th7.htm> recites "fumigation is the use of a gas (not the spraying of insecticides) to destroy pests which may infest a building or a product," where "virtually anything can be fumigated." (pg. 1 col. 3) Bennett continues by teaching that various gases may be used to fumigate a product or environment, and specifically names Nitrogen. (pg. 2) It is noted that MPEP 2144.04 states that "In considering the disclosure of a reference, it is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom." (Thus the article by Bennett is not cited to modify the first reference but to merely provide support for the inherent teachings of Esty.) Therefore, Esty inherently teaches all of the limitations of claims 3, 7, 19, and 23, absent any clear and convincing evidence and/or arguments to the contrary.

With respect to claim 12, which recites the limitation "aperturing said bag and said sealing layer in a single operation," it is the office's view that when applying the cited dictionary definition for "attach", that Esty attaches the bag to the container, adjacent the aperture in the container wall, and further apertures the bag and sealing layer in a single operation. Due to the fact that the tube is hermetically sealed to the bag, the bag is interpreted to be the bag and tube in combination where the tube has been cut by a hot scissor to form a seal. Therefore, a sealing layer is located at the end of the tube(s), where the sealing layer is supported or grasped by the container walls and when an aperture is formed in the sealing layer of the tube an aperture is consequently formed in the bag as well in a single operation.

However Esty is silent with respect to the atmosphere treatment being vacuum cooling, that the package includes a box having a plurality of ventilation apertures formed in at least one wall thereof and that the bag is a vapor permeable bag.

Wu et al. teach "package systems for refrigerated modified atmosphere packaging of fresh fruit, vegetables and cut flowers. More particularly, this invention relates to the design, construction, closure, sealing and use of gas-permeable corrugated paperboard package systems for prolonging the storage life of fresh fruits, vegetables and cut flowers under modified atmosphere in the headspaces of the closed package system" (abstract). The package may possess holes or ports in the end panels (col. 7 line 12), which would allow for "vacuum cooling" and/or blowing in a specific gas mixture. "Thereafter, the ports 16 are covered with high gas barrier tape 20 (see FIG. 3c which illustrates an isometric view of a MAP container with folded ends, ports and a tape over the ports), or filled with high gas barrier or gas-permeable styrofoam plugs 22 (see FIG. 3b, which 3b illustrates an end section view of a MAP container wall with a plug through the port), or plugs with vent pinholes for increased influx/efflux of MA gases. The MAP containers may also be vacuum cooled, i.e. placed in a vacuum cooled enclosed room" (col. 7 line 14+). Wu et al. further teaches that the container or box has a plurality of ventilation apertures formed in at least one wall thereof (figs. 3a and 3c ref. #17).

With respect to the paperboard package, Wu et al. teach that the paperboard package is made up of layers where one of the layers is "a layer of polymer having a gas permeability which permits gas to be transmitted in either direction through the polymer at prescribed levels." (col. 3 line 36+) "The layer of polymer can be flexible and can have

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selected gas and moisture permeability," (col. 4 line 13+) where the "composition of gases is selected to suit individual fresh fruit and vegetable products and their respective levels of respiration." (col. 12 line 61+)

Although Esty does not teach a vapor permeable bag or that the flexible bag has permeability characteristics which are adapted to a given produce, Wu al. does teach the choice of permeability of the bag is respect to the produce which is contained within for the purpose of prolonging the storage life of fresh fruits, vegetables and cut flowers under modified atmosphere where the overall permeability which permits gas to be transmitted into or out of the container is selected with respect to the respiration rate and characteristics of the fresh produce that is to be packaged in the container (col. 3 lines 35-41). Therefore, one of ordinary skill in the art would have been motivated to combine the teachings of Esty and Wu et al. in order to provide a package which not only contained the produce in a bag which allows the flow of specific gases to be transmitted into or out of the package but further to provide a bag which allows for selected moisture permeability's as is taught by Wu et al. (col. 3 lines 13-14) thus increasing the shelf life of the produce within since the bag has specific predetermined permeability's based upon the type of produce and conditions desired.

Regarding the container including a plurality of ventilation apertures, Wu et al. does teach that the layer of polymer can be flexible and can have selected gas and moisture permeability," (col. 4 line 13+) where it would have been obvious to incorporate the ventilation apertures taught by Wu et al. into invention of Esty, since both are directed to providing a specific environment with respect to a specific produce, and since Wu et al. teaches a bag that is vapor permeable (col. 4 lines 13+) where it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have provided ventilation apertures in order to allow the escape of moisture from the container itself in order to achieve the ultimate goal of removing the vapor from the produce which may be sensitive to humidity and increasing the shelf life of the produce. It would have further been desirable to provide ventilation apertures in the container or box in order to facilitate bulk transfer of gas from the container when the container is subjected to vacuum for the purpose of maintaining the refrigerated temperature of the produce uniformly throughout the packaged product while eliminating condensation within the package.

Thus since the only difference between the prior art and the claims was a recitation of relative permeability's with respect to the plastic material, and providing ventilation apertures which are needed as a function of the bag and the produce within the plastic bag, and since the normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages" (see MPEP 2144.04 IIA) to achieve the desired permeability of the bag and container with respect to a specific food item. Thus one skilled in the art could have substituted bags with no change in their respective functions, thus yielding predictable results to one of ordinary skill in the art at the time of the invention where combining the two methods since each of is taught by the prior art to be useful for the same purpose, flows logically from their having been individually taught in the prior art (see MPEP 2144.06), and since MPEP 2144.07 states that the selection of a known process based on its suitability for its intended use supports a prima facie obviousness determination.

With respect to claims 2, and 18 although Esty does not teach that the atmosphere treatment comprises vacuum cooling, Esty does teach that the gas treatment could be performed by evacuating the air by applying a vacuum. Esty continues by reciting that the tube can be connected to a hose, which is connected to a supply of inert gas. (col. 2 line 41+) In the instance where the tube is connected to a source which may supply cool air, Esty would thus be able to apply vacuum cooling to the container. Therefore one of ordinary skill in the art would have been motivated to combine the teaching of Esty and Wu et al. and change the source of the atmosphere treatment used to supply the inert gas to the package as taught by Esty, with a source that supplies cool air instead, as is taught by Wu et al. (col. 7 lines 12+), thus allowing the contents of the treatment package to undergo different treatments, within the same bag, by simply changing the supply source.

Further, it would have been obvious to one of ordinary skill in the art to change the supply source from a first treatment atmosphere to a second atmosphere thus not only allowing the contents of a package to be treated different ways, but would also allow the use of the container for treating different contents with different atmospheres depending upon the different characteristics of the given food type. The claimed method of packaging agricultural produce differs from Esty only in that the atmosphere treatment

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applied in Esty uses inert gasses where the atmosphere treatment of the claims is drawn to a cool atmosphere. Claims 2, and 18 would have further been obvious over the prior art package in view of Esty, since the package is being used for performing the same function of treating a food product within a certain atmosphere, albeit in a different environment. (see MPEP 2144.07)

With regards to claims 13, 16 and 28, although Esty does not teach using a cap to cover the communication hole in the wall of the container, Wu et al. does teach using a cap (fig. 3b ref. #22). In regards to the sealing method of Esty, one would be required to have hot scissors at all time in order to guarantee sealing. However the use of a cap would allow a sealing method to be readily available without the need of an additional step of heating of the scissors in order to obtain the seal. Further, depending upon the type of plastic tube that is used in Esty, the scissors may be required to be of a specific strength, and heat in order to cut through the plastic pipe where the plastic pipe is rigid. Therefore one of ordinary skill in the art would have been motivated to combine the teachings of Esty and Wu et al. in order to provide a sealing method which did not require the use of hot scissors, thus providing a more readily available sealing method.

Therefore it would have been obvious to one of ordinary skill in the art to teach a cap in order to prevent the treating gas from escaping the bag through the treating aperture after treatment and further which is capable of being re-sealed thus providing a carton which can readily accept different gas environments through the same aperture at different times as is taught by Wu et al.

It would have further been obvious to one of ordinary skill in the art to teach a cap since combining the methods of Esty and Wu et al., each of which is taught by the prior art to be useful for the same purpose of providing a modified atmosphere with respect to produce, flows logically from their having been individually taught in the prior art (see MPEP 2144.06). In addition, since MPEP 2144.07 states that the selection of a known process based on its suitability for its intended use supports a prima facie obviousness determination, where in the instance that the produce within bag requires different treatments, the use of a cap as the sealing element would allow for re-sealing thus allowing the contents of the treatment package to undergo different treatments, within the same bag, by simply changing the supply source.

It is noted that present claims 1-12 are drawn to a method for packaging product while patent claims 17-28 are drawn to a package. However given that the method claims are drawn to a method of packaging produce where the bag in the package is filled with produce, it would have been obvious to one of ordinary skill the art to seal the produce in the bag, provide the atmosphere treatment, and then seal the bag as presently claimed.

Response to Arguments

With respect to the obviousness double patenting rejection it is noted that rejection is maintained since there was not a terminal disclaimer provided as was indicated by applicant's response.

With respect to applicant's argument that neither Esty nor Wu et al. either alone or in combination teach a sealing element which is separate from the bag and the box, it is noted that Esty is taken to teach this limitation in the instance that the tubes are taken to be the sealing element, and therefore Esty is taken to teach a sealing element, separate from said box and said bag, since the tubes are separate entities with respect to the bag prior to sealing and the box prior to attaching and as is depicted by applicant's figure 4b element #72. Further in the instance that the phrase is taken with respect to specifically excluding the bag and the box as the sealing element, Esty positively teaches such in the instance that the sealing element is not the box or the bag, where the tubes are located in said at least one sealable localized atmosphere communication aperture, and are operative to seal said bag to said box.. Applicant is further urged to figures 3b, 18, and 19 of Wu et al. which depict a sealing element which is separate from the bag and the box which is a cap.

Therefore one of ordinary skill in the art would have been motivated to combine the teachings of Esty and Wu et al. in order to provide a sealing method which did not require the use of hot scissors, thus providing a more readily available sealing method.

Therefore it would have been obvious to one of ordinary skill in the art to teach a cap in order to prevent the treating gas from escaping the bag through the treating aperture after treatment and further which is capable of being re-sealed thus providing a box with a vapor permeable bag which can readily accept different gas environments through the same aperture at different times as is taught by Wu et al.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to STEVEN LEFF whose telephone number is (571)272-6527. The examiner can normally be reached on Mon-Fri 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571) 272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/

Primary Examiner, Art Unit 1794

/Steven Leff/

Examiner, Art Unit 1794